NO. 79064-7

SUPREME COURT OF THE STATE OF WASHINGTON

In re the Detention of:
ALFRED KISTENMACHER,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

STATE OF WASHINGTON SUPPLEMENTAL BRIEF

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I. ISSUE PRESENTED

Prior to a trial in which Alfred Kistenmacher was determined to be a sexually violent predator and ordered committed pursuant to RCW 71.09, a forensic psychologist interviewed Mr. Kistenmacher, and testimony from that interview was admitted at the trial.

The issue presented to this Court is whether RCW 71.09.040(4) dictates that Mr. Kistenmacher was entitled to counsel during that interview.

II. STATEMENT OF THE CASE

In 1996, Mr. Kistenmacher was sentence to prison for two counts of first degree rape of a child. CP 113. On July 13, 2004, the State filed a petition to commit Mr. Kistenmacher pursuant to RCW 71.09. An ex parte order was entered that same day, finding the existence of probable cause to believe that Mr. Kistenmacher was a sexually violent predator. CP 107-108; 116-17. On July 15, 2004, the parties stipulated to an order of probable cause, and Mr. Kistenmacher was transferred to the Special Commitment Center at McNeil Island shortly thereafter. CP 109-111; 129. Mr. Kistenmacher's counsel signed the stipulated order. CP 103.

On July 19, 2004, Mr. Kistenmacher received a form from intake worker John Rockwell, entitled Notice of Evaluation as a Sexually Violent Predator. RP 3/21/05, p. 5. This form was a unique form not normally

provided to residents at the Special Commitment Center. The form listed several statements with lines next to them for checking, and a signature line at the bottom. The form included the following two statements: "I agree to participate in an assessment for the purpose of evaluation as a Sexually Violent Predator," and "I have been advised by John Rockwell that I may have my attorney present during the clinical interview portion of the evaluation for the purpose of commitment as a Sexually Violent Predator." CP 123. Mr. Kistenmacher put a check on the line next to each statement on the form, indicating he would participate in the evaluation and that he had been advised he may have an attorney present. RP 3/21/05, p. 5; CP 123.

On August 2, 2004, Mr. Kistenmacher was interviewed by forensic psychologist Dr. Harry Goldberg. RP 3/21/05, p. 5. Dr. Goldberg presented Mr. Kistenmacher with a form entitled Notice of Evaluation as a Sexually Violent Predator. RP 3/21/05, p. 5; RP 3/22/05, p. 11; CP 124. This form was substantially the same as the one he received from Mr. Rockwell on July 19, 2004, except that it did not contain language regarding the presence of an attorney. RP 3/21/05, p. 6. Mr. Kistenmacher checked the line indicating that he would participate in the interview, and signed the form. RP 3/21/05, p. 6; CP 124.

Mr. Kistenmacher did not express any misunderstandings about the form, and never inquired about an attorney. RP 3/22/05, p. 12. He understood that the purpose of the evaluation was to determine if he had a mental abnormality or personality disorder that makes him likely to commit predatory acts of future violence. RP 3/21/05, p. 9.

Prior to the forensic interview, Dr. Goldberg reviewed approximately 1200 to 1500 pages of materials pertaining to Mr. Kistenmacher. RP 3/22/05, pp. 23-24. One of the documents Dr. Goldberg received was a list of twenty-eight prior unadjudicated incidents of sexual contact or exposure involving minors that Mr. Kistenmacher had admitted to during a Special Sex Offender Sentencing Alternative evaluation conducted in 1995 by Marsha Macy. RP 3/22/05, pp. 25-34 & 118. Mr. Kistenmacher had told Ms. Macy that these acts occurred over the course of more than three decades, and that his victims were between the ages of five and seventeen. RP 3/22/05, pp. 25-34. During the forensic interview on August 2, 2004, Dr. Goldberg asked Mr. Kistenmacher about each of the prior acts. RP 3/22/05, p. 26.[1] Mr. Kistenmacher did not remember two of the incidents, but admitted to the remaining twenty-six incidents. RP 3/22/05, pp. 26-34.

[1] By 1995 the statute of limitations had expired on all the acts admitted to by Mr. Kistenmacher.

On March 2, 2005, Mr. Kistenmacher was deposed by the State's attorney in the presence of his attorney. During that video deposition, Mr. Kistenmacher again made substantially the same admissions he had made to Dr. Goldberg during the forensic evaluation. CP 140-292.

On March 18–24, 2005, a jury trial was held to determine whether Mr. Kistenmacher should be committed as a sexually violent predator. On the first day of trial, his counsel moved to suppress the testimony of Dr. Goldberg, arguing that Mr. Kistenmacher was denied counsel during the forensic interview on August 2, 2004. CP 67-72. The trial judge found that Mr. Kistenmacher has no constitutional or statutory right to counsel during a forensic interview conducted pursuant to RCW 71.09.040(4). CP 116-119. The trial judge denied the motion. RP 3/18/05, p. 33.

Dr. Goldberg testified as to Mr. Kistenmacher's admissions to the unadjudicated incidents discussed during the forensic interview conducted on August 2, 2005. RP 3/22/05, pp. 26-34. Dr. Goldberg diagnosed Mr. Kistenmacher with pedophilia, and testified that he presented many empirically-supported factors which aggravated his risk to reoffend, such as intimacy deficits, lack of concern for others, sexual preoccupation, sexual coping, deviant sexual interests and impulsivity. RP 3/22/05, pp. 50; 68-91. Dr. Goldberg testified that he concluded to a reasonable degree

of psychological certainty that Mr. Kistenmacher's pedophilia causes him serious difficulty in controlling his sexually violent behavior, and makes him more likely than not to commit predatory acts of sexual violence if he is not confined in a secure facility. RP 3/22/05, pp. 99-100.

The March 2, 2004, video deposition of Mr. Kistenmacher, taken in the presence of his counsel, was played for the jury without objection. RP 3/21/05, p. 43. The deposition included his admissions that he had committed the multiple unadjudicated sex acts involving minors he had previously described to Marsha Macy. CP 140-292.

Dr. Theodore Donaldson, a clinical psychologist, evaluated Mr. Kistenmacher in 2004, and testified on his behalf at trial. RP 3/23/05, p. 77. He testified that he too went through the admissions Mr. Kistenmacher had made to Ms. Macy in 1995, and that Mr. Kistenmacher had told him all the sexual acts were "consensual." RP 3/23/05, p. 130.

On March 24, 2005, the jury found that Mr. Kistenmacher was a sexually violent predator as defined by RCW 71.09. CP 8. He appealed, and the Court of Appeals unanimously affirmed, holding that a psychological examination under RCW 71.09 is not a proceeding during which the right to counsel attaches. This Court granted his Petition for Review of the Court of Appeals decision.

III. MR. KISTENMACHER HAD NO RIGHT TO COUNSEL AT THE FORENSIC INTERVIEW

Mr. Kistenmacher argues that he had a right to have counsel present at the forensic interview conducted on August 2, 2004. As the issues are framed in the Petition for Review, he primarily relies upon the initial notice of the interview – incorrectly stating that he may have counsel present – as conferring a legal right to counsel. Secondarily, Mr. Kistenmacher asks this Court to construe RCW 71.09.040(4) to provide a statutory right to counsel during a pre-commitment forensic interview. Pet. 1-2.

There is no legal authority affording Mr. Kistenmacher a right to counsel at Dr. Goldberg's forensic interview. An incorrect statement or notice by a state employee cannot confer a right to counsel, especially where no action was taken in reliance on the incorrect notice and there is no showing that the presence of counsel would have made any difference. Additionally, under Washington's statutory construction jurisprudence, there is no support for a statutory right to counsel during Dr. Goldberg's forensic interview in RCW 71.09.040(4).

A. Established Principles Of Statutory Construction Jurisprudence Dictate That RCW 71.09.040(4) Does Not Establish A Right To Counsel At The Forensic Interview

Interpretation of a statute is a question of law which this Court reviews de novo. *Wash. Pub. Ports Ass'n v. Dep't of Revenue*, 148

Wn.2d 637, 645, 62 P.3d 462 (2003). This Court considers the entire statute in which the provision is found, as well as related statutes or other provisions in the same act that disclose legislative intent. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003).

1. The Legislature Did Not Intend To Provide A Right To Counsel At Forensic Interviews Conducted Pursuant to RCW 71.09.040(4)

When interpreting a statute, this Court must discern and implement the legislature's intent. *Campbell v. Dep't of Soc. & Health Servs.*, 150 Wn.2d 881, 894, 83 P.3d 999 (2004). The intent of the legislature in enacting RCW 71.09 is readily apparent. The legislature found that the existing process for involuntary commitments providing short-term treatment to individuals with serious mental disorders under RCW 71.05 was inadequate to address the treatment needs of the small but extremely dangerous group of sexually violent predators. RCW 71.09.010. RCW 71.09 was created to identify and treat dangerous people who could not be adequately served under RCW 71.05.

The procedures for a person to be evaluated as a sexually violent predator are set forth in RCW 71.09.040. First, if a judge makes an ex parte probable cause determination that a person is a SVP then he is taken into custody. Second, an adversarial probable cause hearing is held within 72 hours. Under subsection (3), the person has the right to be represented

by counsel during the adversarial probable cause hearing. Fourth, if the court again finds probable cause that the person is a sexually violent predator then the person is transferred to an appropriate facility for an evaluation which "shall be conducted by a person deemed to be professionally qualified to conduct such an examination." Nowhere is subsection (4), the section dealing with the forensic evaluation, does the statute provide for the right to counsel. If the legislature had intended to provide for such a right, it would have been included in the language of subsection (4), just as it had in subsection (3). Under the *expressio unius est exclusio alterius* canon of statutory construction, the express inclusion in a statute of matters upon which it operates implies that other matters are omitted intentionally. *State v. Delgado,* 148 Wn.2d 723, 729, 63 P.3d 792 (2003); *In re Personal Restraint Petition of Hopkins*, 137 Wn.2d 897, 901, 976 P.2d 616 (1999). No construction of RCW 71.09.040(4) allows the creation of an obligation that is clearly absent.

In the prior statutory scheme for civil commitments, 71.05.150(1)(c) provides that a person "shall be permitted to be accompanied by one or more of his relatives, friends, an attorney, a personal physician, or other professional or religious advisor to the place of evaluation. An attorney accompanying the person to the place of evaluation shall be permitted to be present during the admission

evaluation." In contrast, nowhere in RCW 71.09 does the legislature specify that a person has a right to counsel during a mental health evaluation.

If the legislature had wished to confer a right to counsel for evaluations performed under RCW 71.09.040(4), it could have easily and clearly written that into the statute. The conspicuous absence of such a right in RCW 71.09, a statute enacted because the existing statutory scheme of RCW 71.05 did not adequately address the needs of sexually violent predators, demonstrates that the legislature did not wish to confer that right upon persons subject to commitment under RCW 71.09.

To impose the right to counsel during a forensic interview designed to determine whether someone may be subject to the provisions of RCW 71.09 would deter the legitimate state interest of identifying and treating sexually violent predators. Reading the statute as a whole, there is no sign of any legislative intent to treat a psychological exam as an adversarial proceeding in which counsel could be required.[2]

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[2] There is also no language in RCW 71.09 indicating that an attorney for the person being examined could be excluded. However, there is no evidence in this case that Mr. Kistenmacher made any attempt to have his attorney present or that an attorney was excluded from the interview with Dr. Goldberg. In order for Mr. Kistenmacher to prevail under the facts here, he would have to show not only that he is statutorily entitled to counsel at the interview – which he is not – but that he is entitled to assistance from the state to ensure counsel's presence.

2. The Language Of RCW 71.09.050(1) Cannot Be Construed To Create A Right To Counsel At The Forensic Interview

There is a statute that specifically speaks to the right to counsel in sexually violent predator commitment trials. Subsection (1) of RCW 71.09.050 begins by setting forth the timeframe within which the court must conduct a trial, and the subsection ends by dictating that the person shall be confined in a secure facility for the duration of the trial. In the middle of the same subsection, RCW 71.09.050(1) states that "[a]t all stages of the proceedings under this chapter, any person subjected to this chapter shall be entitled to the assistance of counsel, and if the person is indigent, the court shall appoint counsel to assist him or her." This is the only sentence within the subsection that does not use the word "trial". Instead, the legislature used the phrase "all stages of the proceedings." A reasonable reading of this phrase includes legal proceedings beyond the trial, but only legal proceedings during which an attorney would have a role. A forensic interview is not an adversary proceeding, and having an attorney present would serve no purpose.

The legislature's understanding that mental health evaluations are not "proceedings" is clearly demonstrated in RCW 10.77, the statute which governs the procedures for the criminally insane. Subsection (1) of RCW 10.77 gives a person the right to counsel at "any and all stages of the

proceedings." Subsection (3) of 10.77 then specifically provides that "[a]ny time the defendant is being examined by court appointed experts or professional persons pursuant to the provisions of this chapter, the defendant shall be entitled to have his or her attorney present." "Statutes must be construed so that all the language is given effect and no portion is rendered meaningless or superfluous." *Kilian v. Atkinson*, 147 Wn.2d 16, 21, 50 P.3d 638 (2002). If "any and all stages of the proceedings" in subsection (1) of RCW 10.77 included mental health evaluations then subsection (3) of that same statute would be superfluous. By specifically distinguishing between the right to counsel for legal proceedings and the right to counsel for mental health evaluations the legislature made it clear that "any and all stages of the proceedings" does not include mental health evaluation.

This Court previously addressed the phrase "all stages of the proceedings" in RCW 71.09.050(1) in *In the Detention of Petersen*, 138 Wn.2d 70, 980 P.2d 1204 (1999). In *Petersen,* a sexually violent predator did not attend a post-commitment psychological evaluation because he was not allowed to have his attorney present. This Court held that "all stages of the proceedings" pertained only to pre-commitment proceedings. *Id.* at 92. However, the Court did not identify what constitutes a "proceeding" to which a right to counsel would attach.

The common understanding of the word "proceeding" is that it means legal proceedings. *See,* Black's Law Dictionary (abridged 5th ed. 1983) (defining "proceedings" as "[t]he form and manner of conducting juridical business before a court or judicial officer."), and Webster's American Dictionary, Second College Edition (2000 by Random House, Inc.) (defining proceedings as "legal actions, esp. as carried on in a court of law). RCW 71.09.050(1) concerns the commitment trial, and the logical interpretation is that the subsection addresses legal proceedings. When read in the context of the statute and the particular subsection, the logical understanding of "proceeding" excludes forensic interviews.

In the context of a dependency matter, the court of appeals has rejected an interpretation that the right to counsel "at all stages of a proceeding" includes legal representation during a forensic interview. In the case of *In the Matter of the Dependency of J.R.U.-S*, 126 Wn. App. 786, 110 P.3d 474 (2005), the parents argued that because psychological evaluations were statutorily authorized they constituted a "stage" of the proceeding. The court held that a psychological evaluation is not a "proceeding" or "stage of the proceedings," finding that such an interpretation would lead to "absurd results." *Id.* at 802 ("If the evaluation were considered a "stage" of the proceedings, then parents would have a

right to counsel at every counseling appointment, every visit with their children, and every other dispositional activity in a dependency case.").

3. A Proper Statutory Interpretation Of RCW 71.09.040(4) Is Consistent With Constitutional Principles

The statutory language does not contemplate a right to counsel at the forensic interview, and there is no need to create such a right in this case. This Court has held that a sexually violent predator has no constitutional or statutory right to counsel at annual evaluations conducted pursuant to RCW 71.09.070. *In re Detention of Petersen*, 138 Wn.2d 70, 94, 980 P.2d 1204 (1999). Like Mr. Kistenmacher, Mr. Petersen "argue[d] in vague terms due process principles afford him the right to counsel at the personal interview, and the absence of counsel somehow invalidates the evaluation." *Petersen*, 138 Wn.2d at 91. This Court examined and summarily rejected each of Mr. Petersen's claimed bases for a right to counsel. *Id.* at 94.

The principles underlying the Court's decision in *Petersen* are present here. As is dictated by RCW 71.09 and the decisions of this Court, the sexually violent predator commitment process is civil, not criminal. *See, e.g., Petersen*, 138 Wn.2d at 91, *citing In re Personal Restraint of Young*, 122 Wn.2d 1, 23, 857 P.2d 989 (1993). Similar to Mr. Petersen, Mr. Kistenmacher has no Fifth Amendment constitutional right

to counsel, nor a Sixth Amendment right to assistance of counsel "because the personal interview by a psychologist is not a 'criminal prosecution.'" *Id.* at 91..

Decisions in related cases are instructive on the issue. For instance, the California Court of Appeals recently ruled in *People v. Burns*, 128 Cal. App. 4th 794, 799, 27 Cal. Rptr. 3d 352 (2005), that neither the law nor public policy provided a constitutional right to have counsel present during a pre-commitment mental evaluation interview. In *Burns*, appellant appealed his commitment as a sexually violent predator, arguing that he had the right to have his counsel present during an updated psychological evaluation after a petition to commit him had been filed. *Id.* at 799. As in California, the Washington statutory scheme specifically provides for a trial by jury, the assistance of counsel, the right to retain experts or professional persons to perform an examination on one's behalf, and to have access to all relevant medical and psychological records and reports. Compare Cal.Welf. & Inst. Code Section 6603, subd. (a) with RCW 71.09.050(1) and (2).

Additionally, the court of appeals holding in *In the Matter of the Dependency of J.R.U.-S,* that a person does not have a constitutional right to counsel at a dependency evaluation, is persuasive authority for the same holding for sexually violent predator pre-commitment evaluations. The

court found that the parents did not have a constitutional right to counsel at their evaluation because they were not under compulsion to speak. *Id.* at 793-94.

Mr. Kistenmacher has not provided any authority for this court to require that counsel be present during a pre-commitment forensic interview based upon constitutional principles. His Petition for Review does not raise an issue of constitutional magnitude; he simply makes a broad allegation that Dr. Goldberg's "evaluation was conducted in violation of his right to due process." Pet. at 11. Mr. Kistenmacher had the protection of two probable cause determinations: an ex parte finding by the judge, as well as a contested probable cause hearing. He had the right to counsel at all judicial proceedings, to retain his own expert at public expense, to a full adversarial hearing in which the State had to prove beyond a reasonable doubt to a unanimous twelve-person jury that he is a sexually violent predator, and the right to appeal that decision. The record amply supports the conclusion that Mr. Kistenmacher had a meaningful opportunity to be heard. *See Olympic Forest Products, Inc. v. Chaussee Corp.*, 82 Wn.2d 418, 421, 511 P.2d 1002 (1973).

B. The Erroneous Initial Notice Indicating That Mr. Kistenmacher May Have An Attorney Present Did Not Confer A Right To Counsel At The Forensic Interview

Mr. Kistenmacher was provided a form indicating he could have an attorney present during the evaluation to determine whether he met the criteria of a sexually violent predator. The erroneous notice did not and could not confer a right to counsel that does not otherwise exist. An act of one state employee does not bind the state beyond that which has been authorized by law, especially when the act was an unintentional error. Finally, Mr. Kistenmacher took no action in reliance of the notice, and suffered no prejudice as a result.

1. The Language Of The Erroneous Notice Did Not State That Mr. Kistenmacher Had A Right To Counsel At The Forensic Interview.

During his intake at the Special Commitment Center Mr. Kistenmacher was presented with a form by John Rockwell that stated "I have been advised by John Rockwell that I may have my attorney present" during a psychological evaluation to determine if he meets the criteria as a sexually violent predator. CP 123.

Contrary to Mr. Kistenmacher's interpretation, the form does not confer upon Mr. Kistenmacher a right to have counsel present at the evaluation. Rather, the plain language of this form simply stated that Mr. Kistenmacher's attorney "may" attend. Indeed, Mr. Kistenmacher was never prevented from having counsel present at his clinical assessment.

He provides no authority for his proposition that the merely permissive statement by an SCC employee that they would not prevent counsel from being present somehow created an absolute right to not be interviewed absent the presence of counsel.

2. The Erroneous Act Of An Employee Does Not Confer A Right

Mr. Kistenmacher broadly asserts that the state should be bound by the act of its employee, but cites to no authority to support the assertion that a right is created merely by an erroneous statement that an entitlement exists. To the extent that the incorrect initial notice indicated a right to have counsel present at the forensic interview, such a statement would be an *ultra vires* act because Mr. Rockwell had no authorization to confer a right to counsel. *Wendel v. Spokane Cy.*, 27 Wash. 121, 124, 67 P. 576 (1902). Even the doctrine of equitable estoppel cannot prevent the state from repudiating ultra vires acts. *State v. Adams*, 107 Wn. 2d 611, 614, 732 P.2d 149 (1987). *See also Board of Regents of UW v. Seattle*, 108 Wn.2d 545, 552, 741 P.2d 11 (1987) (state does not act and will not be held estopped based on ultra vires acts of its officers); *Hearst Corp. v. Hoppe*, 90 Wn.2d 123, 137, 580 P.2d 246 (1978) (promise of confidentiality does not override requirements of public disclosure law).

A state is not liable for the acts of its agents which are beyond the scope of the agent's actual authority. *See Utah Power & Light Co. v. United States,* 243 U.S. 389, 409 (1917) (establishing that the government is not bound by the unauthorized acts of its agents). Some courts have addressed the significance of an erroneous statement of a criminal defendant's rights and concluded that such a statement does not create such a right if that right does not exist. *U.S. v. Howle,* 166 F.3d 1166 (11th Cir. 1999) (trial court's statement that criminal defendant could appeal did not invalidate waiver of appeal agreed to as part of plea bargain); *United States v. Benitez-Zapata,* 131 F.3d 1444, 1446 (11th Cir.1997) (district court's remark at sentencing that 'it is your right to appeal from the judgment and sentence within ten days' did not invalidate a previously entered plea agreement in which the defendant had waived his right to appeal). This case does not provide a compelling reason to overlook the well-established rule that a mistaken *ultra vires* act does not confer a right.

3. Mr. Kistenmacher Was Not Prejudiced By The Absence Of Counsel At The Forensic Interview

Even if Mr. Kistenmacher could have had counsel present during his evaluation, he is unable to establish that the outcome of his trial would have been different had this occurred. There is no evidence that Mr. Kistenmacher detrimentally relied on the form given to him by

Mr. Rockwell, that he was injured as a result of any reliance, or that a manifest injustice occurred. Mr. Kistenmacher never asked for an attorney after he signed the form, nor did he take any action to ensure that his attorney was present. Additionally, Mr. Kistenmacher cannot show that reliance on the actions of the State were to his detriment, and he offers no evidence to show that the outcome of Dr. Goldberg's evaluation or the trial would have been any different if his attorney had been present.

If counsel had been present during Dr. Goldberg's evaluation his role would have been limited to that of an observer. The only questions that counsel could have possibly objected to were those that elicited statements that Mr. Kistenmacher engaged in sexual conduct with children for which he was never charged. All of the admissions addressed by Dr. Goldberg had already been made to Marsha Macy in 1995. As such, Dr. Goldberg was simply confirming information that already existed. Since all of those admissions are well outside the statute of limitations, counsel would have had no valid legal basis upon which to object to these admissions. When Mr. Kistenmacher was deposed in the presence of his counsel, he admitted to all these same prior uncharged acts, an obvious demonstration that counsel correctly recognized that no basis for objecting to these statements existed. Given that the same admissions were made in the presence of counsel as were made in the absence of counsel, it is self-

evident that counsel's presence at the evaluation would have had no impact on the evaluation. Mr. Kistenmacher's video deposition in which he admitted to all his prior uncharged offenses was played for the jury without objection. As such, Mr. Kistenmacher was not prejudiced by the fact that the same counsel who represented him at his deposition and during the trial was not present at his evaluation, and there is no evidence suggesting that the outcome of his commitment trial would have been any different.

IV. CONCLUSION

Because Mr. Kistenmacher has not shown any authority to support his assertion that he was entitled to counsel at his pre-commitment forensic interview, this Court should affirm the court of appeals' decision and the trial court's commitment of Mr. Kistenmacher as a sexually violent predator.

RESPECTFULLY SUBMITTED this 14th day of May, 2007.

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